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Nos. 84-184, 84-185, 84-186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMS PIPE LINE COMPANY,
Petitioner,

v.

FARMERS UNION CENTRAL EXCHANGE, INC., *et al.*,
FEDERAL ENERGY REGULATORY COMMISSION, and
UNITED STATES OF AMERICA,
Respondents.

ASSOCIATION OF OIL PIPE LINES,
Petitioner,

v.

FARMERS UNION CENTRAL EXCHANGE, INC., *et al.*,
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Respondents.

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FARMERS UNION CENTRAL EXCHANGE, INC., *et al.*,
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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONSE OF PHILLIPS PIPE LINE COMPANY IN SUPPORT OF PETITIONS FOR CERTIORARI

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RESPONSE OF PHILLIPS PIPE LINE COMPANY IN SUPPORT OF PETITIONS FOR CERTIORARI

This memorandum is submitted by Phillips Pipe Line Company in support of petitions filed by the Association of Oil Pipe Lines ("AOPL"), the Williams Pipe Line Company

("Williams"), and the Texas Eastern Transmission Corporation, for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The opinion of the Court of Appeals, *Farmers Union Central Exchange* v. *FERC* ("Farmers Union II"), is reported at 734 F.2d 1486 and is reproduced as Appendix A to the Petitions.

INTEREST OF PHILLIPS PIPE LINE COMPANY

Phillips Pipe Line Company ("Phillips"),* a member of the AOPL, is an interstate common carrier oil pipeline regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Interstate Commerce Act, 49 U.S.C. §§ 1, *et seq.* Phillips was a party to the proceedings below and filed briefs both in the FERC and in the Court of Appeals. The decision of the Court of Appeals, reversing the FERC's determination as to an appropriate ratemaking methodology for the oil pipeline industry, overturns decades of legal and practical precedent in the regulation of this industry. Phillips therefore has a direct interest in this Court's reviewing that decision.

REASONS FOR GRANTING THE WRIT

The Court has before it an industry unique both in its basic economic characteristics and, as an appropriate consequence, in its regulatory history. Since 1906, when the passage of the Hepburn Act placed oil pipelines under the regulatory control of the ICC, regulation of this industry has been different from railroad and all other common carrier regulation and from the regulation of public utilities.

The Court of Appeals recognized this uniqueness six years ago, in the first decision in *Farmers Union Central Exchange* v. *FERC,* 584 F.2d 408 (D.C. Cir.), *cert. denied,* 439 U.S. 995 (1978) ("*Farmers Union I*"):

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* A list of Phillips' parent, subsidiaries, and affiliates, required by Rule 28.1, is attached as Exhibit 1.

> [W]e may infer a congressional intent to allow a freer play of competitive forces among oil pipeline companies than in other common carrier industries and, as such, we should be especially loath uncritically to import public utilities notions into this area without taking note of the degree of regulation and of the nature of the regulated business.

584 F.2d at 413. The FERC acted on remand in accordance with this guidance, concluding that regulation of oil pipelines under a cost-based ratemaking methodology (the methodology on which franchised public utility regulation is based and which the shipper respondents have advocated below) would be inconsistent with congressional intent; with the reality that for more than four decades oil pipelines have performed an essential public service virtually without shipper complaint; with modern economic conditions; and with consumer interests. Yet, having encouraged this conclusion in 1978, the Court of Appeals responded to FERC's decision in 1984, in *Farmers Union II,* with an abrupt and wholesale about-face. Writing for the Court, Judge Wald flatly rejected the reasoning and the result of the agency and substituted the predilections of the panel in favor of cost-based ratemaking.

The Court of Appeals' virtual imposition on oil pipelines of the cost-based ratemaking methodology used in regulating public utilities flies in the face of a litany of precedent from this Court requiring judicial deference to considered and informed agency judgment and conflicts with the congressional intent underlying oil pipeline regulation. In both these respects, the decision departs from the accepted and usual course of judicial proceedings.

Moreover, if allowed to stand, the Court of Appeals' decision will certainly have ominous consequences for this essential national industry and is likely to have significant negative precedential impact on the regulation of other industries as well: Its demand for cost-based regulation will have ushered in a new era of repressive regulatory methodology for oil pipelines and of intrusive judicial review of agency decisionmaking generally. The decision thus creates important ques-

tions of federal jurisprudence which require this Court's resolution.

For these reasons, the Petitions for Certiorari should be granted.

I. The Decision of the Court of Appeals is Plainly Inconsistent with this Court's Decisions on the Proper Scope of Judicial Review

This Court has repeatedly and unequivocally held that the role of the judiciary in reviewing decisions of federal agencies is a narrow one. As early as 1941 in *Gray* v. *Powell,* 314 U.S. 402 (1941), the Court, reversing the Fourth Circuit, outlined a narrow scope of review of agency action, admonished the lower court not to substitute its judgment for that of the administrator, and stated:

> Where as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched.

314 U.S. at 412. A few of the many cases in which this Court has repeated that admonition are cited in the margin.[1] The thrust of all these decisions is clear: A court must not substitute its judgment for the rational judgment of an expert agency charged by Congress with implementing a statutory scheme, even if the agency's interpretation of the statute or chosen method of implementation is different from the one the court would have elected. Consistent with this fundamental principle, this Court has recently found it necessary to overturn several decisions of the United States Court of Appeals for the

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[1] *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 615 (1944); *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962); *Consolo* v. *Federal Maritime Comm'n,* 383 U.S. 607, 621 (1966); *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971); *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 (1974); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U.S. 519, 558 (1978); *FCC* v. *National Citizens Comm. for Broadcasting,* 436 U.S. 775, 803 (1978); *Arkansas Louisiana Gas Co.* v. *Hall,* 453 U.S. 571, 577 (1981); *Motor Vehicle Mfrs. Ass'n of the United States* v. *State Farm Mut. Automobile Ins. Co.,* ____U.S.____, 103 S.Ct. 2856, 2866 (1983).

District of Columbia Circuit for failure properly to circumscribe its reviewing function.[2] The same result is required here.

The decision below focuses on the "just and reasonable" requirement of the Interstate Commerce Act, 49 U.S.C. § 1(5), as if it were a standard with a single meaning applicable in all contexts (Pet. App. A-29-A-50). Thus, the Court of Appeals effectively concludes that the only method for achieving "just and reasonable" rates in the oil pipeline industry is the public utility ratemaking methodology based upon cost (Pet. App. A-33). That conclusion, in the face of the agency's contrary determination, is precisely the sort of substitution of judicial judgment which this Court has consistently forbidden in the cases cited above.

Indeed, the Court of Appeals' insistence that the "just and reasonable" standard can be interpreted in only one way regardless of the context of its application is squarely in conflict with decisions of this Court involving that very standard. In *FPC* v. *Natural Gas Pipeline Co. of America,* 315 U.S. 575 (1942), and *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944), the Court made clear that no particular formula need be used in setting "just and reasonable" rates.[3] *Hope* teaches that it is the result reached by the ratemaker on which the reviewing court is to focus. If the result is rational, the methodology adopted by the agency to obtain it is not a proper object of judicial second-guessing. 320 U.S. at 602. Thus, in the instant case, inasmuch as no specific rates have yet been set for Williams Pipe Line, the Court of Appeals must restrict its

[2] *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 52 U.S.L.W. 4845, 4847 (U.S. June 25, 1984); *Motor Vehicle Mfrs. Ass'n of the United States* v. *State Farm Mut. Automobile Ins. Co.,* 103 S.Ct. at 2867 (1983); *National Ass'n of Greeting Card Publishers* v. *United States Postal Service,* _____U.S._____, 103 S.Ct. 2717, 2725 (1983); *Baltimore Gas and Elec. Co.* v. *Natural Resources Defense Council, Inc.,* _____U.S._____, 103 S.Ct. 2246, 2257 (1983); *American Paper Inst.* v. *American Elec. Power Serv. Corp.,* _____U.S._____, 103 S.Ct. 1921, 1933 (1983).

[3] Although *Hope* is often interpreted, as it is apparently interpreted by the Court of Appeals here (Pet. App. A-33), as requiring the use of an original cost rate base, a close reading reveals that this Court endorsed no particular rate base.

analysis to an inquiry into whether any conceivable application of the formula will produce a "just and reasonable" result. If the methodology adopted will produce such a result, it cannot be overturned on appeal. The decision below disregards that principle.

The *Hope* and *Natural Gas Pipeline* cases were an important departure from the early view that the setting of rates must always involve consideration of the fair value of the property. In *Hope* and *Natural Gas Pipeline*, this Court overruled its prior doctrine in favor of the principle—an aspect of the fundamental concept of judicial deference—that an agency's ratemaking determination is to be upheld where the agency has balanced investor and consumer interests and reached a reasonable end result. *See Hope*, 320 U.S. at 602-03. Rather than evaluating the *result* the methodology might produce, in light of the particular character of the oil pipeline industry, however, the Court of Appeals has immersed itself in a minute examination of the methodology itself (Pet. App. A., *passim*). It has thus turned the clock back behind and beyond *Hope*.

Contrary to the view of the Court of Appeals, Congress's motivation in regulating oil pipelines as common carriers bears significantly on a proper application of the phrase "just and reasonable" to this industry. The "just and reasonable" standard is a flexible one which may have different meanings in different contexts, depending on congressional intent. See, *e.g.*, *American Paper Institute* v. *American Electric Power Service Corp.*, 103 S.Ct. at 1928 (1983). Thus, it may be a more stringent standard in the context of a statute, such as the Natural Gas Act, enacted to protect consumers. But the congressional intent underlying the Hepburn Act was not consumer protection; it was to ensure non-discriminatory shipper access to oil pipelines. *United States* v. *Champlin Refining Co.*, 341 U.S. 290 (1951). In an industry whose rates have a *de minimis* impact on consumers, a finding the Court of Appeals does not dispute (Pet. App. A-42-A-44), the statutory intent to prevent discrimination between shippers hardly requires the rigidity of a cost-based ratemaking methodology.

The FERC achieved a realistic and workable result, and it did so through painstaking effort. Consistent with *Hope*, it

received and examined thousands of pages of evidence, reviewed voluminous briefs, twice heard extensive oral argument, and balanced the competing interests, not only of investors and consumers, but also of carriers and shippers. The FERC arrived at a rate methodology, not perfect, but certainly rational. It was required to do no more, and the Court of Appeals was required to do no less than to give deference to the agency's determination. The Court's failure to accord proper deference is an unwarranted departure from the proper course of judicial proceedings and is alone sufficient to require review and reversal.

II. The Decision of the Court of Appeals Conflicts with Congressional Intent as to the Proper Regulation of Oil Pipelines

The Court of Appeals has departed from proper judicial processes in another respect as well—by a combination of disregard for and misinterpretation of congressional intent.

Congress passed the Hepburn Act in 1906 making oil pipelines common carriers subject to the Interstate Commerce Act (49 U.S.C. §§ 1, *et seq.*). Its intention in doing so was to ensure non-discriminatory access by shippers of oil to pipeline transportation (*Champlin, supra*). The Court of Appeals, contrary to this Court's teaching in *Champlin* that "the statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent" (341 U.S. at 297), finds this congressional intent irrelevant (Pet. App. A-42). It focuses instead on the language of the statute requiring "just and reasonable" rates. By divorcing that specific statutory language from the indisputable congressional purpose, the Court of Appeals is able to conclude that Congress intended to subject oil pipelines to the same general ratemaking principles as other common carriers (Pet. App. A-36), and that FERC may not rely on market forces in oil pipeline ratemaking.

In so doing, the Court of Appeals also ignores the statutory framework of which "just and reasonable" is only a small part. It ignores the fact that oil pipelines, unlike railroads, are

permitted to carry their own commodities (49 U.S.C. § 1(8)). It ignores the statutory provisions prohibiting entry or abandonment of service that apply to railroads but not to pipelines (49 U.S.C. § 1(8)). And it ignores the exemption of oil pipelines from regulation of "acquisitions, mergers, corporate affiliates, uniform cost and revenue accounting, issuance of securities, and corporate or financial reorganizations" (584 F.2d at 413). Thus, the Court manages to conclude that pipelines are to be regulated just like other common carriers only by reading "just and reasonable" out of context. Read in the context of a statutory scheme that places a lighter regulatory hand on oil pipelines than on other common carriers, particularly in view of what Congress sought to accomplish, however, "just and reasonable" means something less stringent for oil pipelines than it does for other common carriers. Indeed, the Court of Appeals so concluded in *Farmers Union I,* stating that the differences in the statutory scheme for oil pipelines, as opposed to other common carriers, caused it to "infer a congressional intent to allow a freer play of competitive forces among oil pipeline companies than in other common carrier industries." That inference induced the Court of Appeals' reluctance to "import public utilities notions" into oil pipeline regulation (584 F.2d at 413).

Without recognition of the different statutory scheme, and contrary to its prior finding, the Court of Appeals apparently feels free to do precisely what it said six years ago it would not do—import public utilities notions into oil pipeline ratemaking and chastise the FERC for relying on the competitive forces it once found compelling.

In marked contrast to its finding that the term "just and reasonable" does not permit the FERC to rely on market forces in regulating oil pipelines (Pet. App. A-42-50), a different panel of the Court of Appeals recently approved reduced regulation for common carrier transponders located on domestic communications satellites. *Wold Communications, Inc.* v. *FCC,* No. 82-2054 (D.C. Cir. June 1, 1984). The Federal Communications Commission, operating under a statutory scheme patterned after the Interstate Commerce Act, and which

includes a requirement that rates be "just and reasonable" (47 U.S.C. § 201), allowed sales of some transponder service free of common carrier requirements. The Court of Appeals expressly approved the agency's reliance on market forces and stated that the FCC does not have

> "unfettered discretion to regulate or not to regulate common carrier service." *Computer II* [*Computer and Communications Industry Association* v. *FCC*], 693 F.2d [198] at 212. But the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances. *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981) (approving FCC reliance on market forces to promote diversity in entertainment programming). This court has several times so recognized. [Citations omitted]

Wold Communications, Inc. v. *FCC*, No. 82-2054, slip op. at 22 (D.C. Cir. June 1, 1984). The opinion of the Court of Appeals in the instant case reaches precisely the opposite conclusion by limiting its analysis to one phrase in the statutory scheme for regulating oil pipelines.

Building on its erroneous reading of both the statute and congressional intent, the Court of Appeals proceeds to flesh out the "general ratemaking principles" applicable to common carriers, including oil pipelines. If the Court of Appeals had been correct about Congress's intent in 1906 to apply general common carrier ratemaking principles to oil pipelines, and had looked at those principles, it would have found the fair return on fair value principles of *Smyth* v. *Ames*, 169 U.S. 466 (1898). Those principles, although no longer mandatory after *Hope*, remained permissible and applicable to common carriers regulated by the ICC for several decades. Indeed, the valuation rate base developed by the ICC for oil pipelines, and adopted by the FERC in this case, is an economically sensible variant of those principles.

However, the Court of Appeals did not look to ratemaking cases construing the Interstate Commerce Act in the period

when Congress supposedly had an intent to subject oil pipelines to those general ratemaking principles. Instead, it examined cases construing the Natural Gas Act, cases that arose many years *after* Congress passed the Hepburn Act. In ***Permian Basin Area Rate Cases,*** 390 U.S. 747, 792 (1968); ***Mobil Oil Corp.*** v. ***FPC,*** 417 U.S. 283, 305-08 (1974); and ***FERC*** v. ***Pennzoil Producing Co.,*** 439 U.S. 508, 519 (1979), the Court of Appeals finds the cost-based principles it espouses.[4]

After importing inapplicable public utility notions into oil pipeline ratemaking, the Court of Appeals compounds its error by ignoring all the post-Hepburn Act legislative history dealing with oil pipelines. That legislative history demonstrates that Congress approved the unique regulatory methodology that the ICC had fashioned for oil pipelines and that the FERC subsequently adopted in part for the industry.

As described in detail in Williams' Petition (Williams Pet. 17-22), between 1950 and 1980 Congress reviewed oil pipeline ratemaking and refused to change it on numerous occasions. This rejection of change occurred, in most instances, when substantive changes affecting ratemaking principles for railroads were made by Congress in the Interstate Commerce Act (Williams Pet. at 17-22). In ***Bob Jones University*** v. ***United States,*** ____ U.S. ____, 103 S.Ct. 2017, 2033 (1983), a case in which Congress similarly refused to amend a statute despite repeated requests to do so, this Court held that Congress's non-action was significant. It is very significant here. But the Court of Appeals ignores that non-action and consequently gave no credence to consistent congressional intent to regulate oil pipelines differently from public utilities and differently from other common carriers.

III. This Case Presents Important Questions of Federal Law Which this Court Has Not, but Should, Address

The Petitions ably discuss the importance of these issues to the oil pipeline industry and to the public. The overarching

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[4] The Court below also finds cost-based principles in *Hope, supra* (Pet. App. A-33). As explained in note 3, *supra,* this Court found those principles permissible but not mandatory (320 U.S. at 603).

question is this: Should the Court of Appeals be permitted to take an industry that has historically operated without need for strict agency scrutiny or judicial intervention and inflict upon it a stringent cost-based regulatory scheme, contrary to the agency's best judgment, and contrary to congressional intent? The answer is that it should not.

At a time in this country's history when available energy supplies are threatened by international politics and are increasingly more difficult and expensive to locate and transport, the Court of Appeals has decided that the FERC improperly balanced the need to stimulate investment in additional pipeline capacity against the interest of consumers. At a time in our economic development when Congress and the executive branch are endeavoring to lessen unnecessary regulation, the Court of Appeals is mandating additional, stringent cost-based regulation for an industry that has operated efficiently, virtually without shipper complaints. At a time when economists and accountants are advocating the recognition and disclosure of current values rather than traditional reliance on historical costs to reflect properly the ravages of inflation, the Court of Appeals is admonishing the FERC to reexamine the "proven alternative" of original cost ratemaking. And, at a time when this Court is stressing judicial restraint and deference to policy decisions made by the legislative and executive branches of our government, the Court of Appeals is substituting its judgment for that of the regulatory agency that heard the evidence—and for the judgment of a predecessor agency and of Congress itself. Left unsupervised by this Court, the Court of Appeals will have mandated unnecessarily repressive regulation for the oil pipeline industry and may continue to encroach upon agency decisionmaking by the FERC and other agencies whenever it believes its policy decisions to be superior.

CONCLUSION

For these reasons, review by this Court is imperative. The petitions should be granted, and the decision of the Court of Appeals, reversed.

Respectfully submitted,

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CHAPMAN, DUFF AND PAUL

EXHIBIT 1

Pursuant to Rule 28.1, the following is a list of affiliates* of Phillips Pipe Line Company as of the date of this filing. Phillips Pipe Line Company is a wholly-owned subsidiary of Phillips Petroleum Company; it has no subsidiaries of its own.

Acurex Corporation
Aero Oil Company
Alyeska Pipeline Service Company
Arctic LNG Transportation Company
Calatrava, Empresa Para la Industria Petroquimica, S.A.
Canada Western Cordage Company Limited
Canyon Reef Carriers, Inc.
Chisholm Pipeline Company
Cochin Refineries Limited
Colonial Pipeline Company
Compagnie Francaise du Carbon Black, S.A.
Dixie Pipeline Company
DRISCO, S.A. de C.V.
East Texas Salt Water Disposal Company
Everglades Pipe Line Company
Explorer Pipeline Company
Great Yarmouth Port Labour Company Limited
Heat Transfer Research, Inc.
Industrias Negromex, S.A. de C.V.
Insurance and Reinsurance Brokers (Bermuda) Limited
Iranian Marine International Oil Company
Kaw Pipe Line Company
Kenai LNG Corporation
Nordisk Philblack AB
Norland GmbH Fur Grundbesitz Und Industrieaulagen
Norpipe A.S.
Norpipe Petroleum UK Limited
Norsea Gas A/S
Norsea Gas GmbH
Norsea Pipeline Limited

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* The list includes all subsidiaries of Phillips Petroleum Company, not wholly-owned.

Oil Insurance Limited (New)
Papago Chemicals, Inc.
Petrochim
Phillips Carbon Black Company
(Proprietary) Limited
Phillips Carbon Black Italiana S.p.A.
Phillips Carbon Black Limited
Phillips-Imperial Petroleum Limited
Phillips Pacific Chemical Company
Phillips Petroleum Singapore Chemicals
(Private) Limited
Phillips Petroleum Toray, Inc.
Philmac Oils Limited
Philmac Panama Incorporated
Plasticos Vanguardia, S.A.
Polar LNG Shipping Corporation
Quimica Venoco C.A.
Renolit-Fertighaus GmbH
The Salk Institute Biotechnology/Industrial
Associates, Inc.
Seadock, Inc.
Seaway Pipeline, Inc.
Sevalco (Holdings) Limited
Sevalco Limited
Spodco Limited
Spodco-USA, Inc.
Transatlantic Reinsurance Company
Trenwick Limited
Venezoil, C.A.
Western Desert Operating Petroleum Company
White River Shale Oil Corporation